

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.

Manor Care of Easton, PA, LLC d/b/a	:	
Manor Care Health Services – Easton,	:	
	:	
Respondent	:	
	:	Cases 4-CA-36064
And	:	4-CA-36190
	:	
Service Employees International Union	:	
Healthcare PA,	:	
	:	
Charging Party	:	

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**ANSWERING BRIEF OF CHARGING PARTY, SEIU HEALTHCARE PA,  
IN OPPOSITION TO RESPONDENT’S EXCEPTIONS**

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## **INTRODUCTION**

As the Administrative Law Judge characterized, the charges here arise out of the Union's organizing efforts at a Manor Care nursing home in Easton, Pennsylvania in which the chief union activist among the employees was given a final written warning for allegedly soliciting residents to sign a letter to a Pennsylvania state legislator. The issuance of this discipline was discriminatory under various legal theories, and was intended, along with other unfair labor practices committed by Respondent, to discourage employees from supporting the Union. To that end, Respondent, in addition to the unlawful discipline, unlawfully interrogated employees, solicited grievances with an intent to remedy those grievances, issued threats related to union activity, and granted benefits as part of its anti-union campaign.

Four days of hearings were held before the Administrative Law Judge at which numerous witnesses testified. Based upon the specific facts of this case, and the ALJ's credibility determinations, the ALJ concluded that Respondent, Manor Care, violated Section 8(a)(1) and (3) of the Act with regard to its many actions of retaliation and interference with the rights of nursing home employees to seek union representation.

Respondent has now filed thirty-five (35) Exceptions to the ALJ's Decision challenging most every critical finding of fact and all the significant conclusions of law. In this throw-everything-including-the-kitchen-sink approach, Respondent also now alleges the ALJ was biased. None of these Exceptions has merit.

## **STATEMENT OF FACTS**

### **A. The Workers Began Organizing Efforts in September 2007**

In early September 2007, SEIU Healthcare Pennsylvania ("SEIU"), the charging party, publicly escalated its efforts to organize nursing homes run by the Employer throughout Pennsylvania. (T. 25)<sup>1</sup> In response to the public reports of SEIU's organizing objective, the Employer in September 2007 gathered its Easton workforce together and showed them an anti-union video. (T. 115) Soon thereafter, a group of its workers began discussing unionizing while on break on the smoking deck. (T. 115) After the workers suggested that one of them should contact a union, one of the workers, Trisha Miechur, searched for a union and contacted SEIU. (T. 115)

An organizer with the SEIU Healthcare PA, Edgar, came to Trisha Miechur's house in early October 2007 to meet with workers. (T. 117) SEIU PA first leafleted the Employer's facility on October 7. (T. 23) Throughout October and early November 2007, the union collected authorization cards from sixty to seventy percent of the Employer's CNAs. (T. 33) Union representative Dennis Short testified that after the first meeting at Miechur's house in early October 2007, the union held regular meetings with the Easton workforce after October 18. (T. 32-33) Further, throughout September and October 2007, workers were frequently talking about the meeting and unionizing while on break on the smoking deck. (T. 117)

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<sup>1</sup> "T.\_\_\_\_" references are to the pages of the transcript of the hearing held before the ALJ.

**B. The Employer Learned of the Easton Workers' Organizing Efforts and Immediately Launched an Anti-Union Campaign, Including Unlawful Interrogations, Threats, and Distribution of Anti-Union Literature in Patient-Care Areas.**

Upon learning of the Easton workers' organizational interest in mid-October 2007, the Employer launched a sweeping campaign to defeat the union. In addition to showing the anti-union video, the Employer commenced one-on-one meetings with staff to convince the staff to oppose the union; these meetings resulted in the interrogations of Trisha Miechur and Anna Klinger. (T. 1221-122; 281-282; 658) This campaign was orchestrated by the most senior corporate staff, including Barbara Kilmurry, the Employer's National Director of Labor Relations, who reported to the Easton facility frequently for the sole purpose of advising management about how to conduct their anti-union campaign. (T. 428-429)

According to the Employer's CEC small group guidebook, management is instructed to hold worker meetings in response to labor activity. (R 8 [d]) Supervisor Rene Burns, the Regional Human Resource Director, also testified that in her experience with the Employer, such meetings were a standard part of the Employer's response to labor activity. (T. 538) Unsurprisingly, then, Burns made the decision to hold more than a dozen on-site worker meetings at Easton on October 29<sup>th</sup> and 30<sup>th</sup>, eleven days after she learned of the union organizing at the facility. (T. 493; 741) Prior to these meetings in October 2007, management had conducted only a single meeting with workers sometime *between three and eight years ago* to discuss workplace issues. (T. 288, 500)

Burns and Diane Johnson, the Employer's Regional Manager, solicited grievances from the workers in these meetings and advised them that they were trying to solve the problems without getting a "third or outside party" involved. (T. 126, 285, 326 [testimony of CNA's Anna Klinger, Trisha Miechur, and Xavier Cordis]).<sup>2</sup> In these meetings, workers complained that Lynette Seiler, the administrator of the facility, and Paula Kubilius, Director of Nursing, were disrespectful to workers. (T. 127; T. 547) These complaints echoed complaints made about supervisors Seiler and Kubilius months before. (GC 52 [complaints to Care Line in June 2007]). The workers also complained about low wages. (T. 286) At the conclusion of these meetings, management developed "action plans" and updated their progress on responding to the workers' grievances, for example easing the burden on the day shift by moving the residents' showers to a different shift. (T. 237)

Even more concretely, within weeks of these one-on-one and small meetings, the Employer transferred both Seiler and Kubilius to different facilities. (T. 717) Diane Johnson testified that the decision to transfer the supervisors was made following the small group meetings and was partially based on information obtained in those meetings. (T. 717) The new Easton facility director, Marionlee Specter, a senior official formerly in charge of several facilities within the Employer's organization, testified that she received a call from Diane Johnson on

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<sup>2</sup> Burns denied making the statement and Johnson never testified about the subject. T. 495; 734.

November 13, 2007 and was told to report to the Easton facility the very next day. (T. 414)<sup>3</sup>

Within a month of soliciting the employees' grievances, Manor Care increased wages. It changed the starting rate from \$10.25 to \$11.00. (T. 387) Other rates were increased. Employees who had already received the maximum hourly raise permitted by the Employer received a lump sum payment to make up the difference. (T. 388; See also GC 38 and 55 [identifying the wage increases given to all CNAs at the Easton facility, which was separate and apart from the annual wage increase received.]) The Employer had not given the employees across the board wage increases, prior to this increase, for three years. (T. 500)

Documents produced by Respondent reveal that it had conducted wage studies for different facilities in 2007, but that the other facilities for which wage studies had been completed, did not receive wage increases. (T. 502; 580; R 9; R 10) Further, the wage studies for the Easton facility suggested that only a 10 cent wage increase would be appropriate. (T. 558; GC 55) The wage increase granted to the Easton workers was more than *seven times* the amount recommended in the study. (T. 387) The Employer did not produce a single witness who was responsible for and/or participated in the decision to issue the wage increase right after soliciting the workers' grievances regarding wages or in the decision to increase the workers' wage so markedly from the amount identified in the wage study conducted by the Employer. (T. 518)

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<sup>3</sup> After the cessation of organizing activities at the Easton facility, Specter was transferred again, back into a position of responsibility for multiple facilities. (T. 417)

In addition to granting the workers' raises, transferring their much-disliked supervisors, and implementing a number of "action plans," management also interrogated, rebuked, and threatened workers regarding their union support in the course of their repeated meetings, conversations, and distribution of anti-union literature by management. (T. 658, 660-662) During one of the Employer's anti-union "education" sessions in early October, stipulated supervisor Deb Kushnerik asked Anna Klinger, a CNA, if she had heard that they are trying to get the union in and whether she knew anything about unions. (T. 281) Prior to this point, Klinger had done nothing to indicate any support for the unionization. (T. 282) In her testimony at the hearing, Kushernik never denied making these statements. (T. 659)

Also in early October, Supervisor Lori Hiembach, at the time the Payroll Clerk/Assistant Human Resources Director, approached Trisha Miechur in the clean utility room and asked to speak with her. (T. 121) Hiembach asked Miechur if she heard that SEIU was trying to organize a union. At this point in time, Miechur had not publicly supported the union. (T. 122) When Miechur responded by saying she supported the effort, Hiembach asked her why and told her that the union could do nothing for her. (T. 122) A few weeks later, Hiembach approached Miechur again and asked her, unprompted, if she had changed her mind about the union. (T. 123)<sup>4</sup>

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<sup>4</sup> Hiembach's testimony should not be credited because her overall recollection of relevant events was very poor, including not recalling attending meetings, detailed below, that multiple other witnesses testified that she was involved in or how she learned that Miechur was allegedly soliciting residents. T. 380-383.

**C. The Employer Issued a Final Written Warning to Lead Union Activist, Trisha Miechur, on a Trumped-Up Charge of Violating a Non-Existing Company Policy and Then Publicly Harassing, Threatening and Attempting to Constructively Discharge Her.**

By mid-November 2007, the Employer had become aware that Miechur was the chief advocate for the union at the Easton facility. (T. 423) Miechur made the first call to SEIU and she hosted the first union meeting at her house. (T. 115-117; see also T. 144 [management official Gierocznski advising Miechur that upper management knew it was she who had contacted the union]). She had participated in a union caravan to the Carlyle Group's Headquarters and a video of the event had been posted online and watched by the employer's management staff. (T. 424) Indeed, Ms. Specter, the new senior official brought in to run the Easton facility after it learned of the organizational campaign, testified that she was briefed on Miechur's union activity on one of her first days at the facility. (T. 423)

Because of her leadership role, the Employer targeted her for discipline, public harassment, and ultimately attempted to constructively discharge her in violation of the Act.

**1. The Employer Issued Union Activist Meichur a Final Written Warning Based Upon an Erroneous Belief That She Engaged in Unprotected Solicitation.**

In late November 2007, workers at the Easton facility began gathering signatures at the Easton facility, and at union meetings, in support of a letter to Pennsylvania Representative, Phyllis Mundy. (T. 45; 238) Representative

Mundy was and is chair of the Pennsylvania House Aging and Older Adults Committee ( the “AOA Committee”), which had held a public hearing in October 2007 to hear concerns about the Carlyle Group’s purchase of the Manor Care nursing homes, including the Employer’s Easton facility. (T. 34) In this public hearing, Representative Mundy’s Committee heard testimony about staffing shortages at Manor Care facilities. (GC 14, 15)

On November 1, 2007, Representative Mundy sent a letter to the Pennsylvania Department of Health (the “Department”) asking them to investigate the buyout fully before approving the transaction. (GC 11) Following the hearing and letters from Representative Mundy, the Department, on November 30, 2007, required Manor Care to agree to specific assurances regarding staffing levels and patient care<sup>5</sup> in order to receive approval of the buyout. (U. 7; T. 64-65)

The letter which the Easton workers distributed in late November 2007 (the “Mundy” letter) asked Representative Mundy to schedule a second hearing so that workers and other interested parties could testify about conditions at the Employer’s nursing care facilities. (T. 49) The letter circulated by the workers, at the encouragement of union representatives, stated that “we are very short-staffed at my facility and it affects patient care.” (GC 3)<sup>6</sup>

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<sup>5</sup> As part of the assurances, each Manor Care facility including Easton, agreed to provide the Department with a detailed description of current direct care staffing levels, copies of weekly staffing schedules, and thirty days advance notice of any permanent reduction in direct care staffing levels with an explanation of why the reductions will not adversely impact patient care. (U. 7)

<sup>6</sup> Union representative Dennis Short, a coordinator of SEIU PA’s Manor Care campaign, testified that he drafted the letter to urge the Committee to hold another hearing in which workers could testify about the potential impact on the Carlyle buyout on staffing levels. (T. 49) Short also explained that his objective in seeking a hearing was to gain the support for the worker’s organizing in the face of the Employer’s fierce anti-union campaign. Id.

At the time the letter was circulated for signature, the problems with patient care and understaffing at Manor Care facilities were also the subject of wide public discussion and dissemination. Representative Mundy heard testimony about staffing shortages at Manor Care facilities in her committee's October 2007 hearing. (GC 14, 15) The New York Times published an article on September 23, 2007, on staffing and care problems at private equity owned nursing homes, which stirred debate in Congress and among state legislators. (GC 19) Local newspapers wrote stories on staffing shortages at Manor Care facilities in July and October of 2007. (GC 29, 30, 31)

In a union meeting held on November 21, 2007, SEIU representatives advised the workers to solicit signatures from their co-workers while on break time and in non-patient care areas. (T. 46) On November 28, 2007, another union meeting was held and both workers and resident family members present at that meeting signed the letter. (T. 46) Workers testified that, at some point in one of these meetings, they were told that workers, residents, and family members could sign in support of the letter. (T. 136; 238)

**a.     The Seizure of Signed Mundy Letters from Union Activist Miechur's Purse by Management.**

According to Miechur's uncontradicted and fully corroborated testimony, she attended the union meeting in which the Mundy letters distributed, but she did not take any for fear of retaliation by the employer. (T. 135-6; T. 238 [testimony of Karolyn Callado, a co-worker, confirming that she never saw Miechur take copies of the letter or agree to get signatures])

Coworkers of Miechur, however, who had agreed to obtain signatures on the Mundy letters had been told they could put the signed letters in Miechur's bag in the "nourishment room" so that Miechur could deliver them to the union. (T. 138) Miechur said she left her bag on the table in the nourishment room, which is a room in which no patient care is conducted as it is reserved for staff use only. (T. 136) The nourishment room is where workers keep their personal belongings. (T. 137)

Miechur's coworker, Karolyn Collado, testified that she saw manager Deb Kushnerik searching through papers on the table in the nourishment room between 4:00 and 4:30 P.M. (T. 241) Collado testified that she saw supervisor Kushnerik standing in front of Miechur's bag reading a document and saw her exit the room with a piece of paper in her hand. *Id.* She reported what she saw to her coworker, Miechur.

The testimony of supervisor Kushnerik essentially was in accord. She testified that she was in the nourishment room – allegedly searching for a wanderguard – and came upon a pile of newspapers, charting papers, purses, and at least one bookbag on the table. (T. 661, 664-5) Patient "wanderguards" – or bands put on patients to ensure that an alarm is signaled if the patient leaves the premises – are not kept in this staff room. (T. 141, 291, 664) Kushnerik stated that as she looked through the "piles of stuff," she saw a piece of paper with a resident's name on it, so she "just took it." (T. 652) She made a copy of the paper and, as she exited the copy area, Trisha Miechur approached her and said that she had something of hers. (T. 653) Kushnerik admitted that although

she gave Miechur a copy of the letter, she kept the original in her pocket. (T. 653)

Miechur confirmed that she asked supervisor Kushnerik to return her papers. (T. 139) She also testified that Kushnerik told her that she should not be handing out the letters (that she had seized from Miechur's purse) out on work time and that Miechur responded by telling her that she had not handed out the papers. (T. 138-9) Then, Kushnerik warned her to "stop worrying about the union and worry about your job." (T. 139)

**b. Respondent Issues Miechur a Final Warning for Soliciting Signatures from Residents, Despite a Denial by Miechur of the Solicitation Charge, and the Failure of Manor Care to Conduct Any Investigation Into the False Charge.**

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According to the testimony of the Easton Administrator, Marionlee Specter, Supervisor Kushnerik came to her and gave her a copy of the confiscated Mundy letter taken from Miechur's purse. (T. 425; 654) Specter testified that Kushnerik told her that she had seen Miechur soliciting residents on the nursing unit, and that she believed that Kushnerik mentioned a particular resident who had advised Kushnerik that Miechur had solicited her. (T. 427; 436; 459) Kushnerik, however, contradicted Specter's account. In Kushnerik's testimony, she never said that she saw Miechur solicit a resident nor that she spoke to a resident who had been solicited. (T. 654) Instead, Supervisor Kushnerik stated only that she was familiar with a rumor that CNA's were soliciting residents and the most likely source of the rumor was from the administration. (T. 674-5)

Soon thereafter, Specter met with Barbara Kilmurry, the Director of Labor Relations for Manor Care nationwide (who was at the facility to manage the Employer's anti-campaign), along with Supervisors Kate Gieroczynski and Lori Heimbach to discuss issuing discipline to union activist Miechur. (T. 429-30)<sup>7</sup>. As conceded by Gieroczynski, the Director of Labor Relations for Manor Care nationwide is not usually involved in disciplinary decisions at the facility. (T. 267; 398) Management officials conceded that all of the supervisors present in the meeting to consider disciplining Meichur were well aware at the time of her leadership role in the organizing campaign. (T. 264)

At that meeting, Administrator Specter told the group that Supervisor Kushnerik found a letter "on the nursing unit" with a resident's signature. (T. 269) According to all of the Employer's witnesses, the group decided to discipline Trisha Miechur because they believed that she solicited a resident. (T. 262; 382) All of the Employer's witnesses agreed that the decision was up to Administrator Specter because she was in charge of the building, (T. 445) and Specter testified that she did not consider the allegation to be a situation of patient abuse. (T. 755)

According to Specter, the management team decided on a punishment and *then* sought a rule violation to justify that punishment. (T. 440; 446) Unable to find any specific work rule violated, the supervisors selected a general "catch-all" rule, B-19, which stated that an employee should "[p]erform your job according to expectations and conduct yourself properly in other serious instances not specifically listed." (T. 264; GC 4 p. 40) Specter also stated that

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<sup>7</sup> Clifford Nelson, an attorney for Manor Care, conferred on the phone with the group. (T. 259)

Meichur's discipline was based upon her violation of the Employer's *unwritten* policy *prohibiting all solicitation of residents anywhere in the facility and at any time*. (T. 756-757)<sup>8</sup>

All of Manor Care's witnesses agreed that prior to issuing the discipline against Miechur, no one from management conducted an investigation into the allegation that Miechur was soliciting residents. Although Heimbach admitted on the stand that the charge against Miechur, according to the Employer's longstanding practices, "wouldn't have warranted a discipline at that level without investigating it first" (T. 396), Administrator Specter never spoke to Miechur, any residents, or other workers about the incident, nor did she direct another supervisor to conduct an investigation. (T. 265 [Supervisor Gieroczynski confirming that she never questioned any residents and that she did not believe anyone else did either]; T. 381 [Supervisor Heimbach never investigated the incident]; and 436 [Administrator confirming that she did not conduct any investigation]) Administrator Specter contended that she did not want to upset the residents, but admitted that she also did not question any employee. (T. 755) No supervisor ever questioned Miechur about the incident; she was simply given a final, written warning. (T. 142)

On November 28, 2007, Supervisors Gieroczynski and Heimbach called union activist Miechur into a meeting in Supervisor Heimbach's office. (T. 142) A supervisor, Josephine Whitmeir, told Miechur that she should not go into the

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<sup>8</sup> The group relied on a Type C discipline issued to Meichur in July 2006 – which, according to the Employer's own policy, could not be relied upon to issue progressive discipline – to heighten the punishment. (T. 440, 444; GC 4, p. 39 [Manor Care handbook specifying that Type C violations are active for one year following the occurrence and are considered inactive for purposes of issuing progressive discipline after one year]).

meeting alone, so Meichur's co-worker, Anna Christina Klinger, went with her to the meeting. (T. 143) At that meeting, Gieroczynski accused Miechur of soliciting a resident and being disloyal to the company and she gave Miechur a final written warning for a Type B violation of company rules and told her that her next step would be termination. (T. 144; GC 2)

In this disciplinary meeting, Miechur told the supervisors in this meeting that the charge was false – that she did not solicit residents. (T. 144; 296) When Miechur asked if any supervisor had seen her solicit a resident, Supervisor Gieroczynski said "no". (T. 144; 296 [Klinger's testified that "Trisha started crying and she said I never gave out that, I don't know what you are talking about, I didn't give out a flyer to anybody and they said she did and she said no, you are accusing me of something that I didn't do."]) Despite both supervisors taking the stand, neither Gieroczynski nor Hiembach testified to their recollection of the events in question. (T. 274; 384)<sup>9</sup> Supervisor Gieroczynski also advised Ms. Miechur that management knew that she was the one who had contacted the union. (T. 144; 296)<sup>10</sup>

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<sup>9</sup> The Board has held that "[w]here relevant evidence which would be properly part of a case is in control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an adverse inference that such evidence would have been unfavorable to him." *Martin Luther King Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1997).

<sup>10</sup> The written disciplinary form given to Miechur marked "no" with respect to whether Miechur had previous warnings, (GC 2), and supervisors Gieroczynski and Heimbach never mentioned the prior discipline in the meeting. T. 144; 296.

**c. Prior to the Issuance of a Final Warning to Union Activist Meichur, the Employer Never Issued Discipline to Workers Who Engaged in Frequent and Repeated Prior Solicitation of Residents.**

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Bhavna Shaw is a coworker of Trisha Meichur and is also employed as a CNA for the Employer. (T. 298) Shaw operates a side business involving the sale of scrubs and regularly sold scrubs at the facility for many years, including throughout 2007. (T. 147-8, 246-7; 298)<sup>11</sup> Employees witnessed Shaw sell scrubs to residents of the facility and to a supervisor. (T. 148; 299, 337-338) Supervisor Lori Heimbach learned that Bahavna Shaw was selling scrubs at the facility, (GC 34) and managers responded by giving Ms. Shaw a *non-disciplinary* coaching form. (T. 389-390) In this *coaching* form, management asked Shaw to stop soliciting for, storing or selling scrubs in the facility.

**2. After Issuing Union Activist Meichur a Written Warning, Management Continued to Harass and Rebuke Meichur, Including in the Presence of Other Workers, for Her Support for the Union, in an Effort to Constructively Discharge Her.**

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In addition to issuing discipline against Meichur for her union activities, management maintained an active and consistent campaign of harassment, including both public and private rebukes from senior management, designed to induce union activist Meichur to resign.

First, in January 2008, the Employer's Human Resources Director, Lori Hiembach, admitted that after seeing a newspaper account of Trisha Meichur's union activity, she told Meichur that she should be "ashamed" of herself. (T. 161;

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<sup>11</sup> The scrubs sold by Shaw are readily identifiable because they sport a distinct neckline and are made from different material from other scrubs. T. 247.

646) Within a week, Administrator Specter called Miechur into her office---after reviewing the articles in the New York Post and the Philadelphia Inquirer regarding Miechur's involvement in a union protest at a private equity conference-- to advise her that she should be ashamed of herself and asked her "how can you walk around the facility with your head held high?" (T. 163-4)

For many months after unlawfully issuing Miechur discipline in an effort to silence her, the Employer's targeted harassment of union activist Miechur continued. On April 7, 2008, during yet another anti-union presentation from management, the Acting Administrator Stolte advised the workers in an anti-union meeting put on by management during work hours that Manor Care had lived through "[c]omments from a few staff that they will go to the press with problems instead [sic] of working together to solve them." (GC 33) Supervisor Stolte admitted at the hearing that the comment referred to Miechur and that she knew of no other staff who had spoken to the newspaper. (T. 616-7) The public attack caused Miechur to leave the meeting. (T. 171)

Following up on the anti-union meeting, Supervisor Stolte approached Miechur again at work later that day. (T. 606) During that conversation, Miechur asserted her rights to engage in pro-union conduct and told Stolte that her presentation contributed to a hostile work environment. In response, as Supervisor Stolte essentially admitted on the stand, Stolte advised Miechur: "if you don't like it, you can quit." (T. 172)

## **ISSUES**

Whether the NLRB should affirm the rulings, findings and conclusions of the ALJ who found that Respondent violated 8(a)(1) and (3) of the Act, in numerous respects and under alternative theories?

## **ARGUMENT**

### **A. The ALJ's Credibility Determinations Must Be Sustained**

It is well-established that the credibility findings of an ALJ are to be given great deference. The Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F2d 362 (3<sup>rd</sup> Cir. 1951). In this case, Respondent Manor Care seeks to set aside the ALJ's credibility determinations by arguing, in essence, that because the judge found that its witnesses were largely not credible, the judge must be biased. Manor Care made no claims that the ALJ was biased during the course of the hearing.

Manor Care cites to the Fourth Circuit's Decision in *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4<sup>th</sup> Cir. 1997). In that case, the Court expressed the belief that an ALJ's credibility determinations are not entitled to deference where they are merely "generalized, conclusory statements". However, no such broad categorical statements were made by the ALJ in this case. Rather, in careful detail and with specific support in the record, the judge explained his credibility

determinations. This can be seen, for example, at the following parts of his Decision<sup>12</sup>:

D 3: 30-41; 43-51  
D 4: 39-50  
D 5: 47-50  
D 6: 43-49  
D 7: 17-51  
D 8: 1-51  
D 9: 4-13; 35-38; 44-51  
D 10-11  
D 13: 28-39  
D 13: 40-48  
D 14: 47-51  
D 16: 37-39; 41-47  
D 17: 50-51  
D 18: 49-50  
D 19: 45-51  
D 20: 44-47  
D 21: 42-51  
D 36: 47-51

Given the specific explanations that Judge Goldman gave for his credibility determinations, there is no reason to review the record independently. To the extent that the Board does so, it will find more than ample support for the ALJ's credibility determinations.

In its Brief, Manor Care refers to a number of examples to support its near hysterical rant that the judge was biased against its witnesses. Reviewing these examples establishes only that Manor Care has lost sight of the record in this case.

Manor Care claims that the ALJ ignored the testimony of Renee Burns with respect to the wage increases issued at Easton and wrongfully declared that the original proposed increases were "miniscule" compared to the "significant

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<sup>12</sup> "D \_\_\_\_" references are to the Decision and Order of David I. Goldman, ALJ dated January 23, 2009.

increases” that were given. It claims there was no record evidence to support such a finding. (Respondent’s Brief at p. 26) Burns’ testimony with regard to the increases was woefully incomplete and totally incredible. When asked what her initial proposal was for a wage increase at Easton, Burns said: “I don’t know off the top of my head. I really don’t remember.” (T. 555:15-16) Burns was shown various exhibits (GC Exs. 54, 55, 56), documents subpoenaed from Manor Care, showing various versions of Respondent’s pay proposals. When asked about one of the proposals (GC Ex. 54), she answered:

“They [the HR Directors] created this, I did not create this, so I don’t know where the rates came from. I couldn’t tell you.”

(T. 556:13-14). Similarly, when shown wage rates on another Manor Care document, Burns testified that she did not know where the rates came from. (T. 557:16-17). Later, however, she said that she “created most of the versions” of the wage proposals. (T. 560:4). As the ALJ noted, no one from corporate headquarters, where these wage proposals were generated and ultimately decided upon, testified to support the employer’s defense. (T. 518; D. 30)

With respect to Respondent’s claim that there was no record evidence to support the ALJ’s finding about the change in the wage proposal, there were subpoenaed documents admitted into evidence demonstrating the increase. (GC Exs. 54, 55, 56) They show that there was an early version in which starting salaries remained at \$10.25 an hour and then a later version which showed an increase in the rate of new employees from \$10.25 to \$10.35. (T. 554:17-22) Yet, the final wage increases granted to employees in December shows an increase in the start rate from \$10.25 to \$11.00. (T. 554:6-9) This clearly

provides record evidence to support a finding that there was a “significant increase” – from ten cents to a seventy-five cents an hour increase – which justifies the ALJ’s findings.

A second example offered by Respondent to justify its claim of bias by the ALJ was his rejection of portions of Burns’ testimony with respect to the small group meetings. Manor Care mischaracterizes the testimony at issue and fails to note the evidence supporting the ALJ’s findings. Burns testified that notices had been posted about the small group meetings and that, as a result, individual employees were not scheduled for a particular meeting but could simply show up voluntarily. (Respondent’s Brief at p. 26) What the ALJ cited in support of his critical comment about this testimony was that the posting was not produced and no supervisor or manager involved in the actual logistics of how employees came to attend the meetings testified. Moreover, the ALJ noted that Burns’ claim was contradicted by the uniform testimony of the sequestered employee witnesses that they were directed by name through loud speaker announcements to attend a particular meeting. (D 6:43-49) This was the testimony of not only Trisha Miechur, but of several other employees. (D 6:14-15)

The third example given by Manor Care to allegedly show ALJ bias against its witnesses are the credibility determinations made against Burns and Johnson when they offered reasons for the transfers of Kubilius and Seiler. (Manor Care’s Brief at pp. 26-27) However, the ALJ’s findings here were well-established. In their effort to present the false impression that Kubilius and Seiler were transferred for reasons other than solicited employee complaints, Burns

and Johnson testified inconsistently and without corroboration. For example, Johnson claimed the decision to transfer to Kubilius was made by Seiler. (T. 696-97) However, this claim was undermined by documents and by Seiler herself. (D 31-32) The transfer request form indicated that Johnson, not Seiler, made the transfer decision. (GC Ex. 53; T. 566-67) Seiler, furthermore, testified that she was not involved in the decision to transfer Kubilius. (T. 784) Burns also claimed she was not involved in the decision. (T. 513) Johnson finally admitted that the decision to transfer Kubilius was made after the small group meetings, where it was evident that she "lacked the confidence of the staff". (T. 717-19) Similarly, the performance evaluations given to Kubilius met company standards. (T. 568)

Likewise, there were problems with Johnson's testimony regarding Seiler's transfer. Initially, Johnson claimed that Seiler was transferred because of "stress". (T. 512, 698-703) On cross examination, inconsistencies between her testimony and her affidavit were highlighted. Johnson then admitted that the decision to transfer Seiler took place after the small group meetings and not because of stress factor, but because Seiler "lacked the confidence of the staff". (T. 717-19) In addition, there were inconsistencies between the employer's defense and Johnson's April 2007 performance appraisal of Seiler which reflected no problems and, in fact, contained complimentary comments. (D 13:41-48) The record, then, demonstrates the complete lack of credibility of Burns and Johnson with respect to these transfer decisions.

Manor Care also unfairly criticizes the ALJ because of his comment that Heimbach had “an unfortunate tendency to not recall specifics”. (Respondent’s Brief at p. 28) It is difficult to keep track of the number of times that Ms. Heimbach stated she did not recall critical events. (See, e.g., T. 381; 383; 384; 385; 646; 647; 648) Indeed, Heimbach, who was the HR Director at the time Miechur was disciplined, attended her disciplinary meeting on November 28, and signed the disciplinary warning given to Miechur, stated, when asked “How do you know that Trisha Miechur was soliciting residents and family members?”, answered “I don’t recall.” (T. 383:8-10)

There are other major inconsistencies between the employer’s witnesses which led to the ALJ’s credibility findings. A significant one is the conflict between Specter and Kushnerick with respect to the events of November 21 and the confrontation between Miechur and Kushnerick. According to Specter, some time on November 21 after the confrontation with Trisha Miechur, Kushnerick came to her with a copy of the Mundy letter (GC Ex. 3) and stated that she (Kushnerick) had “observed Trisha soliciting residents.” (T. 459:4) Yet, Specter also said that she believed it was the resident who told Kushnerick about the solicitation. (T. 459:17-19) No notes were maintained of this conversation, the resident’s name, the resident’s room number or anything else of a specific nature. (T. 459-460)

Kushnerick, on the other hand, recalls no such specific accusation being made about Miechur to Specter. To the best of her knowledge, she told Specter only that “this is what was found on the unit”, referring to the copy of the Mundy

letter taken from Miechur's bag. (T. 654:8-9) When asked if she remembered saying anything further to Specter about what was going on in the unit with regard to the letter, Kushnerick stated: "No. I mean, I don't remember what exactly was said." (T. 654:20) Incredibly, according to her testimony, Kushnerick did not even read the paper she confiscated from Miechur's bag. (D 17)

These inconsistencies in testimony, and glaring failures to remember documents which contradict oral statements, etc. led the ALJ to make the critical credibility findings concerning Respondent's witnesses. This is not evidence of bias on the part of the ALJ, but simply an adherence to the evidence and his observance of demeanor.

Given that the ALJ's credibility determinations were not only detailed and explained but also supported by the record, they must be sustained as must be the Judge's findings of fact which are premised on those credibility decisions. There is not a serious challenge by Manor Care to the ALJ's findings of fact otherwise. Therefore, once those his findings are sustained, the Decision must be affirmed.

**B. The Employer Violated Sections 8(a)(1) and (3) of the Act by Issuing a Final Warning to Union Activist Miechur.**

**1. Introduction**

Under four distinct theories, Manor Care violated the Act by giving Trisha Miechur a last chance warning for soliciting residents. First, Miechur did not, in fact, engage in the solicitation of residents. Under the long-settled rule of *Burnup*

& *Sims*, 379 U.S. 21 (1964), Respondent's mistaken belief cannot serve as the basis for lawful discipline of a union activist<sup>13</sup>. Second, Respondent did not have a policy prohibiting solicitation of residents and, in the absence of such a prohibition, such solicitation is protected activity. Third, even if the Board credits the Employer's claim – not introduced until the hearing – that it had an *unwritten* policy banning solicitation of residents at all times and in all places, its *unwritten* policy is overbroad and cannot serve as a lawful basis for the discipline issued to Miechur. Fourth, assuming *arguendo* that the Employer had a lawful, narrowly-tailored solicitation policy restricting the solicitation of residents in patient-care areas, and that Miechur had, in fact, violated the policy, the Employer discriminated against Miechur by singling her out for disproportionate discipline because of her support for the union. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982). Finally, the record unequivocally demonstrates that the alleged communication was related to an ongoing labor dispute and bore not a single characteristic of disloyal speech.

**2. Union Activist, Trisha Miechur, Did Not Solicit Residents to Sign the Mundy Letters and Management's Disciplining of Miechur Based on Management's Mistaken Belief Violates the Act.**

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According to the Employer, it disciplined Miechur, a known union activist, because she solicited residents. (GC 2) Yet, all of the evidence in the record indicates that Miechur never solicited a single resident.

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<sup>13</sup> The ALJ did not reach this theory of the case (D. 48 fn. 47)

Where an employer is aware that the employee engaged in protected activity and mistakenly believes the employee engaged in unprotected conduct, the employer violates the Act if they discipline the employee. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). As explained by the Supreme Court, the rationale for this long-established rule is that “protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith.” *Id.* at 24.

The Employer’s discipline of Miechur meets the *Burnup & Sims* criteria, rendering its disciplining of Miechur violative of Section 8(a)(3) of the Act. First, Miechur engaged in protected activity and Respondent’s management officials freely acknowledged that they had had full knowledge of her leadership role in the organizational drive when they decided to discipline her. (T. 264, 421)

In this particular instance, Miechur was engaging in protected activity as she transmitted letters related to a labor dispute from her co-workers to the union. Manor Care knew of the protected activity but mistakenly believed that Miechur engaged in alleged unprotected conduct by soliciting a resident (and mistakenly believed that such solicitation *at all times and in all places* constituted unprotected conduct). It is a violation of the Act for an employer to confiscate union literature from an employee, “even where the union literature was unlawfully distributed.” *Alle-Kiski Medical Center*, 339 NLRB 361, 366 (2003) citing *NCR Corporation*, 313 NLRB 574 (1993). Just as the possession of union literature is still protected, even if unlawfully distributed, Miechur’s possession of union literature was protected even if, among the stack of Mundy letters, there

was one letter signed by a resident under impermissible or unprotected conditions.

With respect to the second *Burnup & Sims* criterion, Miechur did not, in fact, engage in the alleged misconduct. Miechur consistently stated that she never solicited a resident, (T. 138-139, 144) and Respondent presented literally no evidence to the contrary. Further, Respondent's officials admitted during the hearing that it never conducted any investigation to even attempt to find evidence to support their belief. See *Wal-Mart Stores, Inc.*, 350 NLRB No. 71 (slip op. at \*2) (2007) (in light of the absent testimony or evidence contradicting employee's denial that she violated the Employer's no-solicitation policy, the General Counsel established that the Employer's discipline was based upon a mistaken belief regarding a violation of the policy); see also *M.V.M. Inc.*, 2008 NLRB LEXIS 123, \*6 (April 25, 2008) (the employer violated the Act when disciplining an employee based on the employer's mistaken belief that it was disloyal, unprotected activity for employees to send a letter to the client's customer claiming that the client was violating their contract and the law.)

Viewed most charitably, the Employer mistakenly believed that Miechur engaged in unprotected solicitation. Now, since the General Counsel has proven that the Employer's contention is, in fact, false, the Employer's discipline of Miechur is unlawful under the *Burnup & Sims* doctrine.

In its Exceptions, Respondent continues to assert that Miechur engaged in solicitation of residents. (Manor Care's Brief at p. 39) Yet it still fails to provide evidence – other than “rumors” – to support that assertion. (Manor Care's Brief

at p. 7) Ultimately, Respondent is forced to argue that merely serving as a “collector” of the letters is the same as directly soliciting residents (Manor Care Brief at p. 7 fn 3). No citation is given for this argument which directly contradicts the logic of *Alle-Kiski* supra.

**3. Manor Care Did Not Have A Rule Prohibiting Solicitation Of Patients And, In Its Absence, Solicitation Of Patients Is Protected Activity.**

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Even if Miechur had solicited residents to sign the Mundy letters – and the record here contains nothing more than an unsubstantiated rumor of such conduct – the Employer’s discipline of Ms. Miechur for engaging in such solicitation violates the Act. Manor Care’s rules did not prohibit its employees from soliciting residents and, in the absence of an explicit prohibition, soliciting a resident remains protected activity. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505 (1978).

Manor Care’s solicitation rule dictates that:

“Solicitation of an employee by another is prohibited while either the employee doing the soliciting or the one being solicited is on his or her work time, regardless of where the solicitation occurs. Solicitation by employees is precluded at all times in immediate patient/resident care areas. Distribution by employees is prohibited at all times in work areas and patient/resident care areas.

Solicitation and distribution are prohibited at all times by non-employees anywhere on company premises.

The preceding rules should be interpreted in conjunction with the following definitions:

Solicitation refers to an employee(s) and/or non-employee(s) approaching employees for the purpose of influencing them to take a specific course of action (other than regular work duties) or make purchases (e.g., for membership, products or subscriptions).

...  
Immediate patient/resident care areas include patient/resident care areas, nurses' stations, kitchen and laundry facilities, and all areas where employees perform job duties."

(GC 4, page 29)

This policy prohibits solicitation of co-workers in immediate patient care areas, but says nothing about solicitation of residents. (GC 4)<sup>14</sup> Most importantly, it defines solicitation as an employee approaching *another employee* to influence them to take a specific course of action. (GC 4) It forbids solicitation in immediate patient care areas, which is defined as patient rooms, treatment and dining areas, and sitting rooms frequented by patients. (GC 4)

Because Miechur clearly did not violate the no-solicitation rule, Manor Care disciplined Miechur under Work Rule B 19, a general catchall rule requiring professional conduct. (GC 4, page 40) Although Manor Care now contends that it maintained a separate solicitation and distribution policy, [R 28 (a)], the Employer presented no evidence that employees were ever trained in that policy or that it was ever distributed to employees. (T. 766) Instead, employees were given generalized training on resident rights during their orientation, but none of those materials dealt, even tangentially, with solicitation of residents. (R 34)

Further, Manor Care was aware of, and complied with, Pennsylvania law that encourages employees to assist nursing home residents in processing their grievances. *See 28 Pa. Code § 201.29*. That section of the Code states that residents of nursing homes "shall be encouraged and assisted throughout the

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<sup>14</sup> Even if the rule could be construed to prohibit soliciting residents, management's rules on soliciting residents were, at best, ambiguous and any ambiguity in the rules must be construed against their promulgator. *See Lafayette Park Hotel*, 326 NLRB 824 (1988) enforced 203 F.3d 52 (D.C. Cir. 1999); *Norris/O'Bannon*, 307 NLRB 1236 (1992).

period of stay to exercise rights as a resident and as a citizen and may voice grievances and recommend changes in policies and services to the facility's staff or to outside representatives of the residents' choice." *Id.* Rather than having a rule forbidding employees from discussing grievances with residents, Manor Care followed state law to encourage and assist residents to make complaints to outside representatives, like Representative Mundy. (T. 460-461; 760)

Finally, Respondent's own actions during its anti-union campaign suggest that it did not believe that residents needed to be shielded from either pro- or anti- union conduct, other than when management singled out Miechur. Supervisors pulled aside workers on the unit and gave them anti-union educational sessions and handed out anti-union literature. (T. 660-661) In fact, a resident found one of management's anti-union flyers on a microwave that was commonly used by residents and questioned Cordis about the employer's anti-union campaign. (T. 340) Also, other residents freely expressed their opinion supporting a union. (T. 302)

Based on the absence of a work rule prohibiting solicitation of a resident, the existence of Pennsylvania law that nursing homes should assist residents in filing grievances, and management's exposure of residents to the anti-union campaign, it is clear that Manor Care did not explicitly or implicitly prohibit solicitation of a resident. In the absence of a prohibition, soliciting a resident is protected activity as employees have a right to enlist the support of customers of the employer. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505 (1978).

Although the Board has recognized that health care facilities may limit solicitation in immediate patient care areas, *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), if a health care facility fails, as Respondent did here, to implement policies to limit solicitation, the employee's activity is protected and the employer can not discipline the employee for violating non-existing work rules<sup>15</sup>. Indeed, in the absence of a formal no-solicitation rule, an employer has the right to discipline an employee for engaging in union activity only with proof that the employee's conduct actually interfered with operations. *Harry M. Stevens, Inc.* 277 NLRB 276, 282-83 (1985); *See also Trico Industries, Inc.*, 283 NLRB 848, 852 (1987) (stating that "where there is no published rule regulating working time, the assumption is that the employer tolerates incursions until they reach disruptive levels.")

Since Respondent chose not to implement a rule banning solicitation of residents and because the record is utterly devoid of any indication that Miechur's conduct disrupted patient care, the Employer's discipline represents a punishment for engaging in protected activity.

In its Exceptions, Respondent conveniently skips over the absence of a rule. It argues at length that it has the right to ban all solicitation of its residents under existing law – a proposition with which the Charging Party disagrees. But however one interprets Board law on this point, it starts from an examination of the employer's rules on solicitation and distribution. *See The Carney Hospital*, 350 NLRB 627, 643-644 (2007). The Board need not reach Manor Care's radical arguments that the right to involve customers in a labor dispute does not extend

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<sup>15</sup> The solicitation rule in *St. Johns* explicitly addressed residents.

to health care patients because there is no employer rule prohibiting patient solicitation to examine in the first instance.

**4. Manor Care's Unwritten Rule Banning All Solicitation of Residents At Any Time and in Any Location Is Overbroad, Rendering the Discipline Issued to Miechur Unlawful.**

Setting aside that Miechur did not solicit residents to sign the Mundy letter and that the Employer's policies did not prohibit the solicitation of residents, the sweeping restriction on the solicitation of residents which Manor Care now claims was its "unwritten policy" cannot serve as a lawful basis for Miechur's discipline. (See T. 756-757 [Administrator Specter testified that Miechur was disciplined for violating the Employer's unwritten policy prohibiting all solicitation of residents at any place at any time]).

The Act protects employees' right to solicit sympathy from the general public and customers of the employer. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S. Ct. 2505 (1978); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000) (holding that an employer unlawfully enforced its no-solicitation/no-distribution rule by refusing to allow off-duty employees to distribute handbills to customers on the employer's property); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995) enf'd., 95 F.3d 681 (8<sup>th</sup> Cir. 1996) (holding that an employer rule prohibiting employees from discussing complaints or problems about the company with their disabled clients was overbroad and that the employer violated the Act by terminating an employee for talking about unionization with disabled riders in his van); *Gayfers Department Store*, 324 NLRB 1246 (1997); *NCR Corp.*, 313 NLRB 574 (1993).

In light of the special considerations at play in health care facilities, the Board has permitted somewhat more stringent prohibitions on solicitation than otherwise permitted outside the healthcare context. *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976). Yet, distilled to its essence, the Board's precedent reveals that **prohibitions against union solicitation are** presumptively valid in patient care areas, "such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas," and **presumptively invalid beyond patient care areas.** *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979) quoting *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (internal quotations omitted).

Significantly, although the Board has permitted more restrictive solicitation rules in patient care areas, as the Court of Appeals for the District of Columbia has explained, "neither this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and non-employees." *Stanford Hospital v. National Labor Relations Board*, 325 F.3d 334, 343 (D.C. Cir. 2003). Instead, the relevant distinction is between immediate patient care areas and non-immediate patient care areas. For that reason, in *Stanford Hospital*, the Court enforced a Board decision which held that an employer violated the Act by adopting a rule that prohibited solicitation of all nonemployees throughout the hospital. *Stanford Hospital v. National Labor Relations Board*, 335 NLRB 488 (2001), *enfd.* 325 F.3d 334 (D.C. Cir. 2003). As to this restriction, the Court specifically affirmed the Board and ALJ's finding that the employer had

presented no persuasive evidence that such a broad ban was necessary to protect patients and prevent any adverse effect upon patient care. *Id.* at 344.

Manor Care's contention that residents of the nursing home must be completely shielded from union activity has been rejected<sup>16</sup>. In *Brockton Hospital*, the Board held that an employer rule which forbade solicitation in patient rooms, halls and corridors used by patients was overbroad and violated employees Section 7 rights. 333 NLRB 1367, 1368 (2001) enforced in relevant part by *Brockton Hosp. v. NLRB*, 352 U.S. App. D.C. 302 (2002). Indeed, the Board in *Brockton Hospital* specifically rejected the idea that a broad ban was necessary, along with its underlying assumption that patients, family members, and visitors need to be broadly shielded from union organizing campaigns. *Id.* at fn. 12.

Most recently, the Board affirmed an ALJ's ruling that a hospital rule prohibiting solicitation and distribution to patients and visitors at all times was overly broad and violated employees' Section 7 rights. *The Carney Hospital*, 350 NLRB 627 (2007). While some of the claims in the case were time barred, the Board held that the overly broad solicitation rule constituted a continuing violation and affirmed the ALJ's holding that the rule was facially invalid. *Id.* The ALJ found that the rule was overbroad because it did not limit the prohibition on solicitation to immediate patient care areas and held that the rule was invalid unless the employer could show it was necessary to avoid disruption of patient

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<sup>16</sup> Manor Care relies in large measure on a footnote in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 fn. 23. But this statement was dicta and not part of the Court's holding. The Court did not engage in the requisite balancing of §7 rights and the hospital's interests, which the Court made clear is required on the issue of patient solicitation.

care. *Id.* at \*23. In reasoning affirmed by the Board, the ALJ rejected the employer's argument that employees do not have the right to solicit clients of the institution. *Id.*

Manor Care's alleged unwritten policy prohibits solicitation of any resident any where at any time. This policy draws a false distinction between employees and clients, when the appropriate distinction is between patient care areas and non-patient care areas. It also runs afoul of the Board rejection of per se rules that workers cannot solicit clients of an institution. Manor Care did not present any evidence that patient care was disrupted at the facility. Nor should it be assumed that union materials are some how inherently disruptive. See, *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996). An overbroad rule can not serve as a lawful basis for disciplining an employee. As explained long ago in *Daylin Inc.*, 198 NLRB 281, 281 (1972), an overbroad no-solicitation policy can "provide no justification for the discharge of an employee who violated it. Therefore, if an employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful unless the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge."

Here, again, the lawfulness of the Employer's discipline of Miechur turns on the lawfulness of its solicitation rule since there is no evidence that Miechur's solicitation activities (of which there were, in fact, none) interfered with employees' work or disrupted patient care. Further, the testimony presented

regarding the characteristics of the Easton facility suggests that solicitation of residents would not tend to disrupt patient care. Multiple employees and managers testified that residents use the laundry room, the hair salon, the sitting room in the entry, and the courtyard of the building, and that no patient care occurs in these areas. (T. 245-246; 308-12; 342) The resident who signed the Mundy letter in question could easily have signed the letter in the courtyard of the building, where no patient care occurred. Manor Care has not provided any evidence that the solicitation occurred in a patient care area, let alone that patient care was disrupted.

Manor Care's alleged unwritten rule broadly banning all solicitation of residents at all times and in all locations is overly broad, violates Section 8 (a)(1), and cannot serve as a basis for disciplining Trisha Miechur.

**5. Manor Care Failed to Present Any Defense or Justification for Miechur's Discipline: Miechur's Transporting of Union Documents Cannot Be Considered Disloyal.**

With no credible evidence that Miechur solicited a resident, the Employer is left only with the unsupportable contention that Miechur's mere possession of the Mundy letters is unprotected<sup>17</sup>.

Section 7 protection encompasses efforts to improve terms and conditions of employment through channels outside the immediate employer-employee relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (565 (1978)). Communications

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<sup>17</sup> Manor Care is inconsistent in its argument. At one point, it argues that it is the "combined impact" of two elements – the involvement of patients and the contents of the letter – that renders Miechur's conduct unprotected. (Manor Care's Brief at p. 39). At another point, it argues that irrespective of the content of the letter, the solicitation of patients was cause for discipline. (Manor Care's Brief at p. 45).

to third parties are protected under the Act and only lose that protection if the employer proves that such communications constitute “detrimental disloyalty.” *NLRB v. Elec. Workers Local 1229* (“Jefferson Standard”), 346 U.S. 464, 472 (1953). Following *Jefferson Standard*, the Board has held that “employees may engage in communications with third parties in circumstances where the communication is related to an ongoing dispute and when the communication is not so disloyal, reckless or maliciously untrue to lose the Act’s protection.” *Emarco, Inc.*, 284 NLRB 832, 833 (1987). The Mundy letters relate to an ongoing labor dispute, contain only true statements, and cannot be classified as disloyal.

**a. The letters relate to an ongoing labor dispute.**

The Mundy letters are addressed to a government official and seek a hearing to discuss under-staffing impacting patient care. The extra stress, and related workplace grievances (e.g. missed breaks and long hours), are clearly terms of employment which identify the substance of the Mundy letters as relating to a labor dispute.

Indeed, contrary to the Employer’s arguments here, simply because a communication also references patient care does not disentangle it from the labor dispute. It is well-established that in the healthcare field, working conditions and patient care are often “inextricably intertwined.” *Misericordia Hospital Medical Center v. NLRB*, 623 F. 2d 808, 913 (2d Cir. 1980); *See also Pilot Dev. Sw.* 317 NLRB 962 (1995) (Employer violated the Act by discharging

eleven CNAs who left their work areas during their shifts and held a press conference with a reporter to discuss, among other things, the impact of staffing levels on patient care).

When discussing whether statements about the impact of staffing levels on patient care are related to a labor dispute, the Board stated that “[e]ven where employees’ communications are primarily concerned with the effect of... staffing on patient care, that is not inconsistent with finding that the communication also related to a labor dispute.” *Valley Hospital Medical Center*, 351 NLRB No. 88 (slip op. at \*4) (2007) citing *Holy Rosary Hospital*, 264 NLRB 1205, 1210 (1982) (internal quotations omitted).

There is ample evidence in the record that employees and residents made numerous complaints to management about staffing levels. (T. 461) One of the employees’ common complaints in the small group meetings was that they were short staffed. (T. 545-546) Residents frequently complained to employees and management about the impacts of short staffing on patient care. (T. 302, 307, 344-345) There were calls to the Care Line complaining about the impact of short staffing on patient care. (GC 51) Furthermore, the union made staffing concerns part of its organizing campaign. (See e.g., GC 18, 26 and 27)

The assurances and commitments that Manor Care gave to the State demonstrate that the entire process of seeking additional hearings to discuss short staffing and concerns about the impact of the buyout on staffing levels related to an ongoing labor dispute. (Union Ex. 7) In those assurances, the Manor Care entities, which includes Manor Care Easton, promised that it would

provide the Pennsylvania Department of Health with detailed descriptions of direct care staffing levels and would give thirty days notice of any reduction in staffing. The scrutiny of the Department is a significant incentive for Manor Care to increase its staffing levels by the reporting date, which has a direct impact on the terms and conditions of employment for the workers at Manor Care Easton. The thirty day notice prior to cutting staffing is a tangible change in the employees' working conditions. Therefore, as the ALJ found, not only did the employees' prior communications with the Committee relate to a labor dispute, they actually affected the terms and conditions of their employment. (D. 46-47)

**b. The Mundy Letters, Which Were Directed to a Government Official Seeking Redress for Problems Relating to Terms and Conditions of Employment and Which Reiterated Complaints Previously Published, Cannot Constitute Disloyal Communications.**

As the ALJ also found, the content of the letters to Representative Mundy possess not a single characteristic of unprotected, "disloyal," communications. (D. 47-48)

Aside from requesting a hearing, the signatories of the Mundy letters merely advised Representative Mundy that "we are very short staffed and it affects the care for our residents." These letters, unlike most instances of alleged disloyal speech considered by the Board, were not released to the general public. *See NLRB v. Elec. Workers Local 1229*, 346 U.S. 464, 472; *Santa Fe Hotel & Casino*, 331 NLRB 723; *Pilot Dev. Sw.* 317 NLRB 962; *Valley Hospital Medical Center*, 351 NLRB No. 88; *Mount Desert Island Hospital*, 259 NLRB 589,

593 (1981). Rather, these letters were sent to Representative Mundy, who was the chair of a governmental committee engaged in oversight of elderly care.

Second, the letters' statement regarding understaffing and its impact on patient care was not new information to Representative Mundy, the general public, or to residents of the Easton facility. Representative Mundy had already heard testimony about staffing shortages at Manor Care facilities. (GC 14, 15) The Employer's staffing problems had been covered in numerous newspaper articles. (GC 29, 30, 31). Residents subscribe, or have access to, newspapers. (T. 251, 302, 334) and the Employer had received widely published deficiency reports relating to understaffing from the Department of Health. (U. 1, 2 and 3; GC 37) These reports are available to the residents as well. (T. 775) In short, Respondent cannot contend that the statements made in the Mundy letters to a governmental official charged with oversight harmed the Employer's reputation. In fact, since the Mundy letters used such sanitized language in articulating their complaint, Respondent cannot even complain that the signatories were hoping to obtain a result based on a "gut reaction." See *Valley Hospital*, 351 NLRB No. 88 (worker communication complaining to the public that 'residents are lying in their own excrement' found to be protected, and not disloyal, speech).

Third, one key criterion in measuring whether statements are protected is the intent of the communication. When the purpose of the communication is to encourage the employer to remedy problems in working conditions and not to needlessly disparage the company, the communications are protected. See *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982); enfd. by

742 F.2d 1438 (2d Cir. 1983) (the Board overturned the ALJ and held that a letter sent by employees of a cleaning service contractor to the contractee which stated that the facility was deteriorating and not being cleaned properly was protected because it was not malicious as the employees' intent was not to get the contract canceled but to improve working conditions.) For example, in *Mount Desert Island Hospital*, 259 NLRB 589, 593 (1981), the Board held that a worker engaged in protected activity when she wrote an op-ed article that criticized the workload and patient care at the hospital and stated that "only very minimal patient care is given and safety standards are stretched to their limit and beyond." The Board stated that it was clear from the "tenor of the article that its intention was not to harass, disparage or harm Respondent, but simply to force the administration to take heed of its employee's complaints about wages and working conditions." *Id.* at 593.

The stated intent of the letters is that, in the course of state legislative meetings about the purchase of Manor Care by the Carlyle Group, the undersigned would "like the opportunity to tell my story about the need for more staffing and better care at the facility." (GC-3) Dennis Short testified that the purpose of the letter was to "send them to Representative Mundy, and encourage her to have a follow up hearing, and allow workers to tell that story directly to the Committee." (T. 45-46) Short also stated that involving elected officials would encourage workers in the face of a harsh anti-union campaign. (T. 45-46) The intent of the letter was to participate in the democratic process and improve working conditions, not to disparage Manor Care.

Finally, the statements cannot be considered disloyal because they were **true**. *Contrast Valley Hospital Medical Center*, 351 NLRB No. 88, (slip op. at 11) (2007) (statements deemed protected even though revealed to be *false*). At the hearing, four workers, Karolyn Callodo, Anna Klinger, Trisha Miechur, and Pua Klinger, each testified that there were staffing shortages and they impacted patient care. (T. 152, 243; 304; 332) They testified that there were staffing shortages somewhere between twenty-five and fifty percent of the time. They described delays in answering call bells and serving cold food. (T. 331) The most frequently described problem was missing last call and leaving residents in their diapers, which can cause skin breakdowns, bed sores, and urinary tract infections. (T. 244, 304) Cordis testified that residents and family members complained to him about staffing levels. (T. 333-335; 344-345) Klinger testified that she heard complaints every week about staffing levels. (T. 306)

The Employer has long been well aware of these problems and the veracity of the statements in the Mundy letters. As described above, Manor Care has received complaints from its staff, residents and family, and has received deficiency reports relating to staffing and patient care from the Department of Health. The assurances secured by the Department relating to the Carlyle buyout underline that the Employer was well aware of concern about its low staffing levels and the quality of patient care being delivered.

Manor Care's only response, to date, has been that the staffing shortages were not below the legal minimums in Pennsylvania. The Mundy letters never accused the Employer of employing staffing levels below state minimums.

Rather, the letter stated simply that “we are very short staffed and it affects the care for our residents.” Literally, all of the evidence in the record underlines that this statement is true.

The Mundy letters communicated truthful information to an elected Pennsylvania representative regarding aspects of the workers' labor dispute which also impacted patient care being delivered by the Employer. These letters are communications lying at the heart of not just the Act's protections but also those of the First Amendment's guarantee of the right to petition the government. Miechur's possession of the Mundy letters is protected activity, and the discipline issued to her violates Section 8(a)(3) of the Act.

**6. Manor Care Unlawfully Discriminated Against Miechur by Issuing Her Disproportionate Discipline Because of Her Support for the Union.**

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The discipline of Trisha Miechur was part of Manor Care's sophisticated and unlawful effort to extinguish support for the union at the Easton facility. Indeed, even if Miechur had solicited residents to sign the Mundy letter, and even if the Employer had implemented a lawful policy banning such solicitation, the Employer's discipline of Miechur still violated the Act because the Employer disproportionately punished Miechur because of her support for the Union. See *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982).

The various prongs of *Wright Line* are easily met on this record. The Employer admits that all management officials were aware of her union activity when they made the decision to discipline her. (T. 260) Manor Care's anti-union animus is equally clear. At the time of Miechur's discipline, Manor Care had already shown anti-union videos, conducted small groups meeting where they solicited grievances from employees and told them to solve the problems without a third party, replaced disfavored supervisors, and pulled employees off the floor to give them anti-union literature and interrogated them about their union support.<sup>18</sup>

On this record, it cannot be disputed that Miechur's support for the Union was a substantial factor in the issuance of the discipline. The Employer admittedly conducted no investigation into the solicitation charge against Miechur, and failing to fully investigate an alleged violation of company policy that serves as the basis for discipline is strong evidence that the stated reason was pretextual. *All Pro Vending, Inc.*, 350 NLRB No. 46 (Slip op. at 11) (2007); See also *Diamond Electric Mfg. Corp.*, 346 NLRB No. 83, (Slip op. at 4) (2006).

In addition, the involvement of Kilmurry, the National Director of labor relations for Manor Care, in the decision to discipline Miechur speaks volumes as to the Employer's objectives in disciplining Miechur. Kilmurry was present at the facility only to implement the Employer's anti-union campaign and, as was admitted, she did not usually participate in disciplinary matters. (T. 267, 398)

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<sup>18</sup> The fact that the Employer had placed a metaphorical target on Miechur because of her union activities is evidenced perhaps no stronger than the statements made by Alicia Johnson, the RN Supervisor, in the Spring of 2008, when she advised Miechur not to sign as a witness on an incident report because any paper with her name on it would raise a red flag. (T. 312)

Further, as explained by Administrator Specter, Respondent decided on a punishment for Miechur first and *then* sought a rule violation to justify that punishment. (T. 446) Unable to find any specific work rule violated, they selected a generic catchall rule which stated that employees should perform according to expectations. *See Greentree Electronics Corporation*, 176 NLRB 919, 920 (1969) (“a discharge based on distribution of union cards during work hours in the absence of a valid rule is suggestive that the employer was reacting to the protected aspect of the employee’s conduct, rather than to considerations of plant efficiency.”)

Finally, Manor Care’s response in the past to staff solicitations of residents-- not involving union activists-- demonstrates that the adverse action would not have taken place were it not for Miechur’s union activity. When the repeated solicitation of residents by fellow CNA, Bahavna Shaw, *in patient rooms* was met with only a non-disciplinary counseling form, Manor Care has no lawful basis for its issuance of a final warning for allegedly the same conduct – albeit utterly unproven, and actually false -- by union activist Miechur.

The Employer issued a final written warning against Miechur for the sole reason that she was an active and prominent supporter of the organizational effort. The Employer’s discriminatory treatment of Miechur violates Section 8(a)(3) of the Act.

**7. Respondent's Exceptions to the ALJ's *Wright Line* Analysis  
Must be Dismissed.**

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**a. The order in which the ALJ decided the case is irrelevant.**

Respondent excepts to the ALJ's decision that it violated section 8(a)(1) and (3) by issuing Miechur a final warning in large measure because the ALJ decided two of the underlying theories in the incorrect order. More specifically, Manor Care claims that before the ALJ went through a *Wright Line* analysis, he first had to determine whether the conduct which allegedly triggered the discipline was protected conduct. (Manor Care's Brief at p. 35)

Respondent offers no convincing precedent that the order in which the ALJ approached this case was erroneous as a matter of law. Logically, there is no wrong order. The General Counsel and Charging Party offered independent and alternative theories that the final warning was unlawful. (D 33; 42) The issue of whether Miechur's activities regarding the Mundy letter were protected or not is irrelevant to the *Wright Line* analysis employed by the ALJ. (D 33-34) In essence, the Judge assumed that the Mundy letter was unprotected activity and then proceeded to apply *Wright Line* to show that other protected activities were the motivating factor in the discipline of Miechur. (D 34, 30) If, as Manor Care suggests, the ALJ had found, first, that the activity with respect to the Mundy letter was unprotected, he would nevertheless need to undertake the *Wright Line* analysis. If the ALJ found that the conduct in question was protected, still, given the alternative theories offered by the General Counsel, the ALJ would be permitted to pursue *Wright Line* as an alternative theory of the case. The order in which these two theories are approached is irrelevant. Respondent cannot

establish that the judge's approach, in which he assumed that the conduct was unprotected, somehow tainted his *Wright Line* analysis.

**b. The ALJ Properly Applied *Wright Line***

Respondent, after making its illogical argument that the ALJ improperly addressed *Wright Line* first, argues that the ALJ did not properly apply *Wright Line*. The overwhelming evidence of record, however, shows that the ALJ's conclusions are fully supported by the record. He clearly found both direct and indirect evidence of anti-union animus and causation. There was strong evidence that the discipline of Trisha Miechur was motivated by her Union activities. (D 35-39) The argument that the General Counsel did not establish a *prima facie* case under 8(a)(3) is frivolous.

Manor Care next asserts that it carried its burden to establish a *Wright Line* defense. It claims the ALJ applied an improperly "high standard" for assessing this issue. (Manor Care Brief at p. 54) Yet, an examination of the analysis set forth by the ALJ shows that he applied the proper legal standard for an employer to establish a *Wright Line* defense. (See D at 34-35; 40)

The ALJ properly dismissed the *Wright Line* defense. The reasons given for the discipline of Miechur were clearly pretextual. There was overwhelming evidence that the Respondent's motivation was unlawful. This case is unlike those where there is a stated rule of conduct which the employee violated or where there is conduct which any employee would reasonably know could trigger discipline. Here, it was admitted that there was no written rule issued by

Respondent to its employees which prohibited solicitation of residents at any time or any place. This is to be contrasted with the detailed rules that did exist on the topic of solicitation and distribution between employees. (See GC 4) The absence of a rule prohibiting solicitation of residents, in the face of detailed rules governing solicitation, indicate, as argued above, that the alleged conduct was not prohibited. Moreover, an employee had no reason to know that discussing staffing levels and care with a resident would subject the employee to discipline. In Manor Care, the issue of short staffing was frequently discussed within the facility. Employees had complained about it. Family and residents complained about short staffing. (T. 302, 307, 244-345, 461) Respondent acknowledged that residents not only have the right to write letters to politicians concerning the conditions at the facility, but that State regulations make it incumbent upon a facility to encourage residents to air those grievances. (T. 460-461) Department of Health deficiency reports were available for residents to see. (T. 775) These reports show problems at Manor Care resulting from short staffing. (See U. 1, 2 and 3) Whether or not solicitation of residents is protected, it is evident that an employee would not reasonably expect that discussing staffing problems with residents is conduct which would trigger discipline.

It is for that reason that Manor Care made up reasons for its discipline of Miechur. While Respondent claims that her conduct involved “solicitation” of residents, solicitation rules were not the basis of her discipline. Rather, it was the vague and catch-all rule that employees must “perform your job according to expectations and conduct yourself properly in other instances not specifically

listed". (GC Ex. 4 at p. 40) That such a vague rule unrelated to solicitations was utilized is evidence of pretext.

Manor Care's lack of investigation into Miechur's activities and its deviations from its own procedures constitute other evidence of pretext. This lack of investigation demonstrates that Respondent did not wish or need to establish any wrongdoing by Miechur, and that it did not care if other employees engaged in the same or more culpable conduct. It simply wanted to make an example of Miechur because of her union activities. The ALJ documents this glaring lack of investigation. (D. 41) According to Specter, Kushnerick stated that a resident claimed she had been solicited with regard to the Mundy letter. However, there was no interview of that resident, or any resident. (T. 459) There was no report made; there were no notes maintained in any file concerning Miechur's conduct on November 21. (T. 462, 655, 755)

This lack of any investigation is to be contrasted with Manor Care's policy of conducting investigations in patient abuse cases as well as cases involving interference with patient care. In such cases, an investigation is performed. (T. 453-456) Similarly, the standard procedure at the facility was that an investigation would be done in any case where a Type B (Major) violation is at issue<sup>19</sup>. In fact, Human Resources Director Heimbach assumed that an investigation of Miechur's conduct took place. As Heimbach explained, "...it wouldn't have warranted a discipline at that level without investigating it further". (T at 396) Manor Care never explained, in any credible fashion, its lack of an investigation and deviation from its own procedures. Nor did it explain the

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<sup>19</sup> The discipline issued to Miechur was for a Type B violation.

discrepancies between what Kushnerick reported to Specter and what Kushnerick claimed she told Specter.

Indeed, Respondent, neither at the time of the discipline nor at the time of the ALJ hearing, had any evidence of the conduct of which they accused Miechur. The warning she was given alleges that her misconduct was “distributing pre-printed forms for their (residents) signatures...”. (GC Ex. 2) The Employer had no evidence to support this claim other than “rumors” that Miechur was involved in solicitation. The only “evidence” was finding a letter among Miechur’s personal belongings in a room utilized by CNAs as a place where they deposited their personal belongings. According to her un-refuted testimony, Miechur denied at the time that she was engaged in solicitation of residents.

In short, Respondent had no evidence that Trisha Miechur was involved in solicitation of residents. There can be no greater evidence of pretext by an employer that accusing an employee of misconduct for which there is absolutely no substantiation. Rather, Respondent’s intent was to send a chilling message to Miechur and other employees by disciplining her, not for her conduct with respect to solicitation, but because of her union activities<sup>20</sup>. That explains why Gieroczynski acknowledged, at the disciplinary conference on November 28, that she was aware of Miechur’s union activities, and why she failed to contradict Miechur’s claim, once again at that conference, that she was not involved in the solicitation of residents. (T. 144, 296) Similarly, no explanation was given to

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<sup>20</sup> Union activities were picking up at this time. Not only was Miechur on the Union web page concerning the Carlyle takeover of Manor Care and its implications for patient care, but also on November 24 the Union leafleted Manor Care nursing homes, including Easton. (GC Ex. 17; T. 51) Miechur was seen as the leader of the Union’s effort at Easton.

Miechur when she questioned why she was being given a final warning when there were no prior warnings. (T. 143-145, 195-96, 218, 297-97)

**c. The Cases Relied Upon by Manor Care are Inapplicable.**

Manor Care cites to the Board's Decision in *Elko General Hosp.*, 347 NLRB No. 123 (2006) to support its argument that the ALJ erred in finding that Respondent failed to establish a *Wright Line* defense. However, *Elko* is easily distinguishable. The conduct in *Elko* occurred in a single meeting. There was no protected activity that occurred before the meeting which allegedly led to discipline. Secondly, while the Board did state that the absence of a practice of discipline for similar conduct was not dispositive, it noted that Pollard's conduct was unprecedented and particularly egregious. Thirdly, there was no evidence that the employer's rationale in *Elko* was pretextual.

Here, on the other hand, Miechur openly engaged in protected activity before November 28. Secondly, her alleged solicitation of residents was not unprecedented. Other evidence of solicitation of residents was introduced and the employee (CNA Shah) involved was not disciplined. (GC 34) Furthermore, the record here includes evidence of other employee conduct which was as egregious as the alleged conduct of Miechur, but which did not lead to a severe discipline as imposed on Miechur. (See GC 35) For example, an employee who was involved in patient abuse was given a first written warning rather than the final warning given to Miechur. As the ALJ found, this disciplinary history undermines Respondent's claim that it would have disciplined Miechur with the

same severity had she not been a Union activist. (D. 40-41) Finally, there is an abundance of evidence that Manor Care's stated reason for the discipline was mere pretext.

Manor Care also cites *Waste Management of Arizona*, 345 NLRB 1339 (2005), where the Board agreed with the ALJ that the employer had met its burden under *Wright Line*. Again, the case is distinguishable. Unlike the conduct in *Waste Management*, here there was evidence that Respondent tolerated behavior as egregious as Miechur's is claimed to be. Moreover, in *Waste Management* there was no evidence, as there is here, that the stated reason for the employee's discharge was pretext. The employee did not deny screaming profanities at his manager. Here, Miechur testified that she did not solicit residents and the Employer had no evidence that she did.

Next, Respondent cites to *Mountain Shadows Golf Resort*, 338 NLRB 581 (2002). There, the Board had previously remanded the case to the ALJ holding that a flyer issued by Jensen was not protected under the *Jefferson Standard*. No such finding has been made here and, as contended above, Miechur's conduct was not disloyal under *Jefferson Standard*. It is quite different from the conduct engaged in by Jensen who solicited residents to replace his employer with named competitors. (338 NLRB at 582) Secondly, there was no dispute that Jensen circulated the flyer. Miechur denied circulating the Mundy letter and there is no evidence to the contrary. Thirdly, the Board in *Mountain Shadows* found that the ALJ relied upon a flawed analysis in rejecting the employer's explanation for the discharge. Also, the Board noted that the ALJ did not make a

credibility decision when refusing to accept that explanation. *Id.* at 583. In contrast, here, the ALJ found on numerous occasions that Respondent's witnesses were not credible based upon their demeanor, shifting stories, contradictions with other employer's witnesses, and failure to account for the deviations from Manor Care's own procedures regarding discipline. In short, there is ample basis for rejecting testimony offered by Respondent's witnesses.

Finally, the Respondent relies upon *Tom Rice Buick*, 334 NLRB 785 (2001). The ALJ correctly held this case inapplicable. (D 42, fn. 52) First, the employee's conduct in *Tom Rice Buick*, leaving work early without any explanation, was admitted by the employee. 334 NLRB at 786. Here, Miechur denied that she solicited residents. Secondly, while there was no work rule in *Tom Rice Buick*, the Board found that an employee would reasonably know he or she had to give advance notice of an early departure that resulted in the closing of a department. In fact, the employee acknowledged that he failed to do what he should have done. *Id.* Here, as explained previously, a Manor Care employee would not reasonably know that it was improper to discuss staffing issues with residents given the absence of any rule prohibiting this type of solicitation, the ongoing discussions within the facility on this short staffing, and the State regulations encouraging nursing home residents to air their grievances. Of course, there is no reason for an employee to believe it was improper conduct to simply hold among her personal belongings a letter signed by a resident. Finally, *Tom Rice Buick* contains none of the evidence of disparate treatment,

pretext, and lack of credibility in the employer's explanation that are such major factors here.

In sum, the cases cited by Respondent do not support its argument that it met its *Wright Line* burden. Under *Wright Line*, once the General Counsel makes a showing of discriminatory motivation, "the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity." *Elko General Hospital*, 347 NLRB at 1426-1427.

Respondent cannot meet this burden by negative arguments, for example, simply because the record did not affirmatively demonstrate disparate treatment, its defense must prevail. (ManorCare's Brief at p. 59) The employer must produce a preponderance of evidence to show that the same action would have been taken even in the absence of the protected activity. *Wright Line*, 251 NLRB at 1989.

No such evidence was produced by Respondent. There is simply its assertion that Miechur's actions were inherently bad without any proof that her actions occurred or that they were disruptive. Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected time docked. *North Carolina License Plate Agency*, No. 18, 346 NLRB 293, 294 (2006); *Hicks Oils & Hicks Gas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7<sup>th</sup> Cir. 1991). Just as Respondent produced no evidence that Miechur actually engaged in the conduct for which she was disciplined, it

failed to produce evidence that it would have taken action against her even without her high profile union activities. Accordingly, the ALJ was correct in dismissing Respondent's *Wright Line* defense.

**C.     The Employer Violated the Act by Repeatedly Harassing, Rebuking, and Attempting to Constructively Discharge Union Activist Miechur Because of Her Support for the Union.**

Sometime in October 2007, prior to unlawfully disciplining Miechur, the Employer violated the Act when Hiembach, then the Payroll Clerk/Assistant Human Resources Director for Manor Care Easton, cornered Miechur on two separate occasions and interrogated her about her union support.

An employer's interrogation of a worker's union sympathies violates the Act because, in order to fully and freely exercise their rights, employees are entitled to keep their views about the union to themselves. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F. 2d 1338, 1342 fn. 7 (5<sup>th</sup> Cir., 1980), cert. denied 449 U.S. 889 (1980). The test for whether an interrogation of employees is unlawful is if under, all of the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. See *Blue Flash Express*, 109 NLRB 591 (1954); *Sunnyvale Medical Clinic*, 227 NLRB 1217 (1985). Some of the factors considered include the background of employer anti-union hostility surrounding the questioning, the identity of the questioner, the nature of the information sought, the truthfulness of the reply, and the place and method of interrogation. *Bourne v. NLRB*, 332 F.2d 47 (1964). The Bourne factors are not applied mechanically, rather the inquiry holistically evaluates the

employee's experience to determine whether the questioning was coercive.

*Westwood Health Center*, 330 NLRB 935, 940 (2000).

Hiembach's interrogation of Miechur violates the Act because Hiembach's status as a supervisor or agent of Respondent, the timing of the interrogation, and the employer's clear hostility to the union rendered the questioning coercive. See *Westwood Medical Center*, 333 NLRB 934, 941 (holding that the most significant reason for finding that an interrogation was unlawful was the backdrop of employer anti-union hostility and illegal conduct). Here, Hiembach approached Miechur and asked her about the union shortly after the employer had held a mandatory in-service training to show workers an anti-union video. (T. 120-121) Hiembach reiterated that message when she told Miechur "the union can't do nothing for you." (T. 122) Then, Hiembach aggravated the illegality by approaching Miechur soon thereafter and asking her if she had changed her mind. (T. 123)

The Board has found virtually identical language violates the Act. *Atlantic Veal & Lamb, Inc.* 342 NLRB No. 37 (slip op. at \*14) (2004) (the Board affirmed the ALJ's holding that an employer violated the Act when a supervisor asked an employee "what [he] knew about the union.")

The Employer contends that this conduct was not unlawful because Miechur allegedly "self disclosed" her union status to another supervisor, Reitnauer, and because Hiembach allegedly was not a supervisor or agent of the Employer. Both contentions lack merit.

As to whether Miechur had disclosed her union support to management at the time of the interrogation by Hiembach, the only evidence offered by the Employer is testimony that Miechur (who denied this allegation under oath) had advised another supervisor, Reitnauer – under a promise of confidentiality – that she was hosting a meeting with union officials to discuss the possibility of unionization. (T. 683, 594) The Employer does not contest that Miechur did not intend for her union support to become public knowledge at that early date.

As a matter of law, however, the Employer's contention that Miechur had been open about her union sympathies to management is too tenuous to have any relevance to the inquiry into the lawfulness of Hiembach's interrogation: a cursory review of the Board's analysis in the seminal case on the subject, *Rossmore House*, 269 NLRB 1176, 1178 (1984), reveals that the Board has never held that an employer can interrogate a union supporter. Rather, the Board simply has noted that open union support may be included as part of "totality of the circumstances" considered in determining whether an interrogation is coercive. *Id.*

Miechur's alleged disclosure to a union friendly management official in confidence regarding the scheduling of a union meeting falls far short of the broadcasting of union support the Board conceded could be relevant in *Rossmore House*. 269 NLRB at 1178 (two employees sent a telegram to the owners informing them that they intended to organize the employees into a union.)

Second, as the Assistant Human Resource Director until her promotion to full Human Resource Director on October 24, 2007, Hiembach's status as a supervisor and/or agent for the Employer cannot credibly be disputed on this record. Even before she was promoted, as her job title of Assistant Human Resources Director indicates, Hiembach was involved in the hiring, rewarding, and disciplining of employees. (T. 366, 521-22) Indeed, in her application for the promotion to the position of Human Resources Director, Hiembach detailed her extensive experience and involvement with employee disciplinary decisions. (GC 50; T. 395, 640) Further, Hiembach was the regular stand-in supervisor, since she assumed the responsibilities of the Human Resources Director when the previous director was on vacation. (T. 525-526) Finally, as the regular conduit from management to the staff at the facility, Hiembach's status as the Employer's agent is apparent. (T. 521-523, 629; GC 45) Employees correctly and reasonably viewed Hiembach as having the authority to act for management, rendering Hiembach the undisputed agent of the Employer.

In interrogating Miechur regarding her union sympathies in early October 2007, Assistant Human Resources Director Hiembach operated as the agent and/or supervisor for Manor Care, thereby violating Section 8(a)(1) of the Act. (D. 23-24)

**D. Supervisor Kushnerik Unlawfully Confiscated Trisha Miechur's Union Materials and Threatened Her Because of her Union Support.**

It is a violation of the Act for an employer to confiscate union literature from an employee. *Alle-Kiski Medical Center*, 339 NLRB 361, 366 (2003) (the

Board affirmed the ALJ's holding that an employer violated the Act by confiscating union literature "even where the literature was unlawfully distributed.")

According to Supervisor Kushnerik's own testimony, she knowingly confiscated Miechur's union materials. Although she said she simply "found" the union papers in the nourishment room, when Miechur advised her that the papers were hers and demanded the return, Supervisor Kushnernik testified that she kept the original and only returned a copy to Miechur. (T. 653)

Even assuming that the Mundy letter was obtained by an unlawful solicitation, Kushnerik's confiscation of the literature was unlawful. See *Alle-Kiski*, 339 NLRB at 366. (D. 36) Kushnerik compounded the illegality by telling Miechur that she should "stop worrying about the union and start worrying about her job." (T. 139)<sup>21</sup> This communication instructed Miechur to cease to engage in union activity and implicitly threatens her with reprisal for her union activity.

Accordingly, Manor Care violated the Act when a supervisor told her to stop worrying about the union and start worrying about your job. (D. 36)

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<sup>21</sup> Although Kushnerik testified that she did not tell Miechur to stop worrying about the union, her recollection of the events of the day is highly suspect. (T. 657) She could not recall what she told the Administrator when she gave her the paper, nor whether she ever wrote anything up about the incident. When discussing whether she wrote something up, she stated, "it was a long day and I don't remember if I did do that or not." (T. 655)

**E. Manor Care Violated the Act when Supervisors Hiembach and Specter Rebuked Miechur for Her Union Activity and Attempted to Constructively Discharge Her.**

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It is undisputed that Lori Hiembach, Manor Care's Human Resources Director, saw a newspaper account of Trisha Miechur's union activity and told her that she should be ashamed of herself. (T. 126; 616)

Miechur also testified, without any contradiction by the Employer's witnesses, that Administrator Specter called her into the office and told her that she should be ashamed of herself and asked her how she could walk around with her head held high. (T. 164)

The Board has held that advising employees that they should be ashamed for engaging in protected conduct violates the Act. *See Smithfield Packing Co.*, 344 NLRB 1, 5 (2004); *See also Legget Department Store*, 137 NLRB 403, 404 (1962) (the employer violated the Act when a supervisor asked an employee if she was ashamed to walk in the door after a newspaper article described her role in a Labor Board hearing against the company). These rebukes by management to Miechur clearly violated the Act. (D. 53)

After the Employer unlawfully disciplined Miechur, on April 7, 2008, Miechur was once again harassed and rebuked for her union activities – this time by supervisor Stolte. In yet another anti-union presentation put on by management, supervisor Stolte used the presentation to target Miechur publicly for her union activities. Indeed, the second slide of Stolte's presentation stated that Manor Care Easton had lived through "[c]omments from a few staff that they will go to the press with problems instead [sic] of working together to solve them."

(GC 33) It would have been plainly obvious to the other CNAs that Stolte was referring to Miechur. In addition to being a violation of Miechur's Section 7 rights, it also precipitated her walking out of the meeting in protest. (T. 618)

The anti-union presentation was the backdrop for Stolte's follow up conversation with Miechur. During that conversation, Miechur asserted her rights to engage in pro-union conduct and told Stolte that her presentation contributed to a hostile work environment. In response, Stolte, in her words, told Miechur that "no one was making her work there." (T. 606) Miechur's recollection of events is that Stolte told her "if you don't like it, you can quit."

The Board just recently affirmed that such statements constitute violations of the Act. In *Wal-Mart Stores, Inc.*, when handed union literature by a worker, the supervisor advised the worker that "[i]f you believe that, you're [not] worthy of working at Wal-Mart." 350 NLRB No. 71 (slip op. at \*2) (2007). As explained by the Board in *Wal-mart*, the supervisor's comment violated the Act because it "disparaged [the employee] for engaging in protected activities and suggested that his protected activity was incompatible with continued employment." *Id.*

Manor Care violated the Act when the Acting Administrator responded to an employee's frustration about being singled out in an anti-union presentation by saying if you don't like it, you can quit. This sent the clear message that a hostile workplace, one in which Miechur was publicly disparaged for engaging in protected activity, would continue and that her activities were incompatible with continued employment at the facility. (D. 54)

In summary, Manor Care violated the Act when Stolte disparaged Meichur in an anti-union meeting and then advised her that her only option to escape the continued unlawful harassment and discrimination was resignation.

**F. The Employer Violated the Act by Unlawfully Interrogating CNA Anna Klinger Regarding Her Union Sympathies.**

Manor Care did not constrain its unlawful interrogations to its favorite union target, Meichur. Indeed, in October 2007, Kushnerik, a stipulated supervisor, also interrogated Anna Klinger, another CNA, about her union sentiments.

As part of Manor Care's anti-union campaign, supervisors were assigned the task of conducting educational sessions with groups of one or two employees. (T. 658) In these sessions, the supervisors told the employees about problems with unions and handed out literature giving negative information about unions. (T. 660-662; see also GC 5)

During one of these education sessions in early October, Kushnerik asked Ms. Klinger if she heard that they are trying to get the union in and whether she knew anything about unions. (T. 281) Prior to this point, Klinger had done nothing to indicate any support for the unionization. (T. 282) Supervisor Kushernik testified and never denied making this inquiry of Klinger. (T. 659)

As detailed above, the determination of whether an interrogation of employees is unlawful turns on whether, in light of the totality of circumstances, the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. *See Blue Flash Express*, 109 NLRB 591 (1954);

*Sunnyvale Medical Clinic*, 227 NLRB 1217 (1985); *Westwood Health Center*, 330 NLRB 935, 940 (2000).

Kushnerik's interrogation occurred during an organizing campaign, which heightens the coercive nature of any interrogation of an employee. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB No. 124 (2004). Even more critically, supervisor Kushnerik's interrogation was part and parcel of a sweeping, coordinated and unlawful anti-union operation put on by the Employer. In short, at the time of this interrogation, Manor Care was making every effort, legal and illegal, to ensure that employees avoid unionization. (See, e.g., GC 5, 6)

While Kushnerik was not the chief executive for the Easton facility, the Employer's anti-union campaign systemically employed and relied upon its lower-level supervisors to deliver a coordinated anti-union message. (T. 660 [low-level supervisors at the Easton facility were given a script to follow in their anti-union conversations with the workers]). See also *Koch Engineering Co.*, 155 NLRB 1272, 1273 (1965) (interrogations conducted as part of a coordinated anti-union campaign subject to heightened scrutiny.) Kushnerik herself distributed anti-union letters from the facility's Administrator (T. 664; GC 5, 6), which ensured that her questioning bore the most authoritative imprimatur.

Finally, nothing about Supervisor Kushnerik's conversation with Klinger was casual or jovial, or suggested that Klinger was not obliged to answer her supervisor's unlawful inquiry into her union sympathies. Contrast *Phillips-Van Heusen Corp.*, 165 NLRB 1, 9 (1967) (holding that the employer did not violate the Act because the conversation was casual when two employees initiated a

conversation to tell a supervisor that they had signed union authorization cards). Kushnerik pulled Klinger off the floor of the unit and into a private hallway to make the inquiry. T. 281. In these circumstances, the wording of Kushnerik's question amounted to asking Klinger whether she was supporting the union. When an organizing campaign is ongoing, asking a person their opinion on unions is not an academic inquiry. It is a question to gauge their level of support for the organizing. It also violates the embodying principle for the restrictions on interrogating employees: that the employee is entitled to keep her opinion about unionizing to herself. Kushernik's interrogation was coercive and interfered with Klinger's rights under the Act. (D. 24)

### **CONCLUSION**

For the reasons set forth above, the Charging Party, SEIU Healthcare PA, submits that Manor Care's Exceptions to the Decision of the Administrative Law Judge should be dismissed and the Board should affirm, in all respects, that Decision.

Respectfully submitted,

Willig, Williams & Davidson

BY:   
BRUCE M. LUDWIG, ESQUIRE

DATED: April 3, 2009

**CERTIFICATE OF SERVICE**

This is to certify that on the 3<sup>rd</sup> day of April, 2009, I served a copy of the foregoing Answering Brief in Opposition to Respondent's Exceptions upon the following parties by electronic mail:

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Date: April 3, 2009